California Supplement to MIEC *Claims Alert* #17

Informed Consent Revisited: What is Expected of Physicians

This supplement contains excerpts from California laws related to informed consent, consent by minors and special consents. California physicians who have questions about a specific patient or who require legal advice may call MIEC's Claims Department in Oakland at 800/227-4527. For general liability questions, physicians and their staff can call MIEC's Loss Prevention Department in Oakland, CA at 800/227-4527.

Informed Consent

In California, the current law on informed consent is derived largely from the case of *Cobbs vs. Grant* (1972) 8 Cal.3d 229. The judge in an informed consent case may instruct the jury that ". . . it is the duty of the physician or surgeon to disclose to the patient all material information to enable the patient to make an informed decision regarding the proposed operation or treatment.

"Material information is information which the physician knows or should have known would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended medical procedure. To be material a fact must also be one which is not commonly appreciated.

"There is no duty to make disclosure of risks when the patient requests that he or she not be so informed or where the procedure is simple and the danger remote and commonly understood to be remote.

"Likewise, there is no duty to discuss minor risks inherent in common procedures, when such procedures very seldom result in serious ill effects.

"However, when a procedure inherently involves a known risk of death or serious bodily harm it is the physician's duty to disclose to the patient the possibility of such outcome and to explain in lay terms the complications that might possibly occur. The physician or surgeon must also disclose such additional information as a skilled practitioner of good standing would provide under the same or similar circumstances." [*Book of Approved Jury Instructions (BAJI) 6.11*]

MIEC's defense attorneys recommend that doctors tell patients in lay terms the nature and purpose of the proposed surgery or treatment. (The *Cobbs* Court stated that ". . . the patient's interest in information does not extend to a lengthy polysyllabic disclosure on all possible complications. A mini-course in medical science is not required; the patient is concerned with the risk of death or bodily harm, and the problems of recuperation.")

The risks, complications, expected benefits of the recommended treatment, as well as alternatives, including the absence of treatment, and the consequent risks and benefits should be explained. The physician should advise the patient why one mode of treatment is more desirable than others, but should not accede to a patient's demand for treatment the physician knows would be inappropriate, ineffective, or harmful.

Court rulings address physicians' concerns that informing patients of the risks of medical treatment will frighten them and thus make them greater risks: "A physician has no duty of disclosure beyond that required of physicians of good standing in the same or similar locality when he or she relied upon facts which would demonstrate to a reasonable person that the disclosure would so seriously upset the patient that the patient would not have been able to rationally weigh the risks of refusing to undergo the recommended [treatment] [operation]." (*BAJI 6.11*)

This decision to forego the consent discussion so as to not seriously upset the patient should be very carefully considered and used only in rare situations. In such cases, defense attorneys advise physicians to have a consent discussion with the patient's closest relative. The physician's reasons for foregoing the discussion should be documented.

Physicians may be excused from disclosing risks if the patient requests not to be informed: "There is no duty to make disclosure of risks when the patient requests that he or she not be so informed or where the procedure is simple and the danger remote and commonly understood to be remote." (*BAJI 6.11*) The patient's refusal should be documented.

When a patient is incompetent

Adults who have been legally adjudged to be incompetent usually cannot consent to medical treatment. Consent must be obtained from the patient's guardian. There is little direct authority on the right to consent where an adult has not formally been adjudged incompetent, but his

or her reasoning is impaired due to mental illness, intoxication, pain or other causes. In the absence of a legal guardian, defense attorneys advise that the right to consent passes to the patient's closest available relative. If there is no relative, emergency consent may be implied if a genuine emergency exists. If the patient's mental disability is temporary (for example, if the patient is delirious with pain), the patient's own consent for further treatment must be obtained as soon as he or she is able to reason for him- or herself. If the patient does not possess decision-making capacity, the decision-making authority passes to: the Attorney-in-Fact under a Durable Power of Attorney for Health Care, if any; the conservator, if any; the closest available relative; or court order, if circumstances warrant.

Physicians should be familiar with each hospital's policy concerning obtaining consent from legally or mentally incompetent patients.

Consent for treating minors

The age of majority in California is 18 years. A person under the age of 18 lacks the legal capacity to give consent for medical treatment except under the circumstances cited below.

Married Minor: Any minor who is or was married (whether or not the marriage has terminated by divorce) may consent to medical, surgical, psychiatric, or hospital care without parental consent or knowledge. Health professionals may require the minor to produce a marriage certificate [*Family Code §7002 and §7050 (e)(1)*].

Minor Emancipated By a Court Order: A minor may petition the superior court of the county in which the individual resides, or is temporarily living, for a declaration of emancipation. The minor must be at least 14 years of age, willingly lives separate and apart from his or her parents or guardian (who have consented to this arrangement), and manages his or her own financial affairs *[Family Code §7120*].

Self-Sufficient Minor: A person 15 years of age or older living separate and apart from his or her parent(s) or legal guardian, with or without the parents' consent, and managing his or her own financial affairs, regardless of the source of income, is capable of giving consent for medical, surgical, dental, hospital, or psychiatric care without parental consent, knowledge, or financial liability [*Family Code §6922*]. Physicians may wish to ask such minors to complete a form which provides information demonstrating that the minor falls within the statute.

Minor on Active Duty: Regardless of age, any minor serving on active duty with any branch of United States armed services may consent to treatment without parental approval [*Family Code §7002 and §7050 (e)(1)*].

Pregnant Minor: Any minor, without respect to age or marital status can consent to care for the prevention or treatment of pregnancy, except that a minor cannot consent to sterilization. A pregnant minor also may consent to an abortion, provided she demonstrates the requisite understanding and maturity to give her informed consent to the procedure. The physician is charged with making this determination [*Family Code §6925*].

Minor with an Infectious Disease: A minor who is 12 years or older and may have come into contact with a contagious, infectious, or communicable disease, including sexually transmitted disease of the type which must be reported to the local health officer and a variety of non-reportable sexually transmitted diseases, may consent to care related to the diagnosis or treatment of the disease [*Family Code §6926*].

Rape Victims and Victims of Sexual Assault: A minor age 12 or older who alleges to have been raped may consent to care related to the diagnosis and treatment of the condition. A minor under the age of 18 who is alleged to have been sexually assaulted may consent to treatment for the condition. The health professional providing treatment to a minor victim of sexual assault must attempt to notify the minor's parent(s), and document the contact or unsuccessful effort to reach the parent(s). *Note:* The professional person may defer such contact with the parent if he or she reasonably believes the parent(s) or legal guardian of the minor committed the sexual assault, in which case the professional should document that contact was not attempted and why it was not. The professional should also document compliance with sexual abuse reporting laws when appropriate [*Family Code §6927 and §6928*].

Minor with Drug or Alcohol-Related Problems: A minor age 12 years or older may consent to medical care and counseling for drug- or alcohol-related problems. Counseling services must be rendered by a provider under a contract with the state or county to provide alcohol or drug abuse

services [*Family Code §6929(a)(1)*]. [Treatment with methadone and/or levoalphacetylmethadol (LAAM) is excluded.] While the consent of the parent or guardian is not required, the parent or guardian must be afforded an opportunity to participate in the treatment or counseling, unless the treating professional, or treating facility, considers this inappropriate. The refusal or objection to the minor's treatment by the parent or guardian so notified does not require the professional to discontinue the treatment. The treating health professional must document efforts to contact the parent or guardian or the reasons why it was inappropriate to make such contact.

Effective January 1, 1997, a parent or legal guardian can seek medical care and counseling for a drug- or alcohol-related problem of a minor child without the minor's consent. In such cases where a parent or guardian sought treatment for a minor, the physician will disclose medical information concerning the care to the minor's parents or legal guardian upon their request, even if the child does not consent to disclosure [*Family Code §6929*].

Mental Health Treatment of Minor: A minor age 12 or older may consent to mental health treatment or counseling on an *outpatient* basis, or specifically defined residential shelter services, if the minor is considered: mature enough to intelligently participate in the program; there is a present danger of serious physical or mental harm to the minor or others if he or she is not permitted to participate in the program; or the minor is an alleged victim of child abuse or incest. The minor described in this section may not receive convulsive therapy, psychosurgery, or psychotropic drugs without parental or guardian consent. The parent or guardian must be afforded an opportunity to participate in the treatment or counseling, unless the treating professional considers this inappropriate. The treating health professional must document efforts to contact the parent or guardian or the reasons why it was inappropriate to make such contact [*Family Code §6924*]. The refusal or objection to the minor's treatment by the parent or guardian so notified does not require the professional to discontinue the treatment.

Other: Minors over the age of 12 may consent to performance of a blood test to detect HIV antibodies [*Health and Safety Code §121020*].

Minors 17 and older may consent to donate blood. Minors 15 years and older may consent to give blood if the minor's parents or legal guardian *and* a physician authorize the donation in writing [H*ealth & Safety Code §1607.5*].

A minor's parent(s) or guardian may sign a statement authorizing a third party to consent to a minor's medical care in the parents' absence. If a physician treats a minor with the third party's informed consent, the physician should keep a copy of the parental authorization in the medical record [*Family Code §6910*].

Special consent requirements

Physicians should be aware that California law mandates special consent requirements, including the distribution of certain written information and/or the signing of specific consent forms for some treatments, procedures, and surgeries. These include: breast cancer treatment, silicone breast implants and collagen implants, dimethyl sulfoxide (DMSO) treatment, hysterectomies, prostate cancer treatment, sterilization for both men and women, assisted reproduction treatment, certain vaccinations for children and adults, experimental procedures, electroconvulsive therapy, HIV testing, and the administration of antipsychotic drugs.

Informed consent laws as they apply to blood transfusion lack specificity; however, it is prudent for physicians to discuss the relevant information with patients, obtain their informed consent to a blood transfusion, and document the discussion in the patient's medical record.

The Paul Gann Blood Safety Act [*Health & Safety Code §1645*] makes it mandatory for a physician to inform patients of the benefits and risks of receiving various types of blood transfusions "whenever there is a reasonable possibility that a blood transfusion may be necessary as a result of a medical or surgical procedure." This require- ment applies to all non-emergent medical and surgical procedures, not only those which are "elective."

Physicians also are required to dispense to patients a standardized summary of those options in a brochure entitled, *If You Need Blood: A Patient's Guide to Blood Transfusion*, published by the Department of Health Services (DHS). This is the responsibility of the physician, rather than the hospital. This brochure may be purchased from the Medical Board

of California, Office of Procurement, Publications Section, P.O. Box 1015, North Highlands, CA 95660. The standardized literature may be photocopied. The law requires doctors to note in patients' charts that the brochure was dispensed.

Consult MIEC's Loss Prevention Department for further information about special consent requirements and corresponding consent forms.

Telemedicine

Amended Business & Professions Code §2290.5 established special informed consent requirements for the practice of "telemedicine." Telemedicine is defined as: "...the practice of health care delivery, diagnosis, consultation, treatment, transfer of medical data, and education using interactive audio, video or data communications. Neither a telephone conversation nor an electronic mail message between a health care practitioner and patient constitutes 'telemedicine'..."

Before a physician, who "has the ultimate authority over the care and primary diagnosis of a patient" can deliver any health care via telemedicine, the doctor must obtain the patient's or legal guardian's verbal and written informed consent.[1]

The patient or legal guardian must be informed orally and in writing of:

(1) the option to withhold or withdraw consent at any time with affecting the right to future care or treatment; (2) a description of the potential risks, consequences and benefits of telemedicine; (3) all existing confidentiality protections that apply; (4) patient access to medical information and copies of medical records; (5) consent for the dissemination of any patient identifiable images or information from the telemedicine interaction to researchers or others entities.

The patient or legal guardian must sign a written statement prior to the delivery of health care via telemedicine to indicate understand-ing of the written information given to the patient or legal guardian. The consent form must become part of the patient's chart.

This law does not apply to an emergency situation where the patient is unable to give informed consent and the patient's representative "is not available in a timely manner." The law also does not apply to a patient who is under the jurisdiction of the Department of Corrections.

'Informed refusal'

In 1980, the California Supreme Court created a new legal doctrine, "Informed Refusal," which holds that a physician may be liable for failing to tell patients the consequences of refusing to have diagnostic tests or medical treatment [*Truman v. Thomas* (1980) 27 Cal.3d 285, 291].

"It is the duty of a physician to disclose to the patient all material information to enable the patient to make an informed decision regarding the taking or refusal to take a diagnostic test.

"Material information is information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the diagnostic test or procedure. To be material, a fact must also be one which is not commonly appreciated.

"Failure of the physician to disclose to his patient all material information, including the risk to the patient if the test is refused, renders the physician liable for any injury, a [proximate] [legal] cause of which was the patient's refusal to take the test, if a reasonably prudent person in the patient's position would not have refused the test if all material information had been given." [*BAJI 6.11.5*]

MIEC's legal counsel advises physicians to tell patients the consequences of their refusal in broad terms. It is not necessary to discuss every conceivable problem which might occur. Just as important as telling the patient the risks of refusal is documenting that you discussed the possible consequences of refusal. A brief, but meaningful note suffices. Some doctors write: "Patient refuses test (treatment); explained consequences of not having treatment and degree of urgency, and patient understands."

1. *California Physician's Legal Handbook 1998,* "Telemedicine," 6:55.

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